Tentative Rulings for January 15, 2013
Departments 402, 403, 501, 502, 503

There are no tentative rulings for the following cases. The hearing will go forward on these matters. If a person is under a court order to appear, he/she must do so. Otherwise, parties should appear unless they have notified the court that they will submit the matter without an appearance. (See California Rules of Court, rule 3.1304(c).)

09CECG04060 ***Utility Trailer Sales of Central Calif. v. Roberts Managing Contractors, Inc. et al.*** **(Dept. 503)**

10CECG00813 ***South Fresno Housing v. Smith*** **(Dept. 503)**

10CECG03054 ***Alonso v. Mission Homes*** **(Dept. 503)**

The court has continued the following cases. The deadlines for opposition and reply papers will remain the same as for the original hearing date.

09CECG03581 ***Turmon v. Cooper*** **is continued to Wednesday, January 30, 2013, at 3:30 p.m. in Dept. 403.**

10CECG03800 ***Torigian v. Shmavonian et al.*** **is continued to Wednesday, January 16, 2013, at 3:30 p.m. in Dept. 502.**

(Tentative Rulings begin at the next page)

Tentative Rulings for Department 402

(18)

Tentative Ruling

Re: ***Beal Properties, Inc. v. Garfield Beach CVS, LLC***
Case no. 12CECG02435

Hearing Date: **January 15, 2013 (Dept. 402)**

Motion: Demurrer to the complaint

Tentative Ruling:

The demurrer is taken off-calendar as moot in light of the filing of the first amended complaint on January 08, 2013.

Explanation:

Under California Code of Civil Procedure (CCP) section 472, plaintiff has a right to amend the complaint once up to the time of the hearing on the demurrer. (Barton v. Khan (2007) 157 Cal.App.4th 1216, 1221.)

Pursuant to California Rules of Court rule 3.1312, and CCP section 1019.5, subd. (a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling
Issued By: **JYH** (Judge's initials) **on** **1/14/13** (Date).

Tentative Ruling

(24)

Re: ***Floyd Billberry v. PetSmart***
Court Case No. 11CECG03316

Hearing Date: **January 15, 2013 (Dept. 402)**

Motion: Defendant PetSmart's Motion for Summary Judgment

Tentative Ruling:

To deny

Evidentiary Objections: To overrule all objections

Explanation:

Re. Evidentiary Objections:

The first three objections are not actually evidentiary objections but rather are defendant's attempt to dispute plaintiff's additional facts because of plaintiff's erroneous citations to his deposition testimony. On this basis, these objections are all overruled. Moreover, all but one of the facts cited are found in the copy of the deposition transcript as presented by each party. Since the pages of transcript submitted are not voluminous, the cited facts are easily found, and the court in its discretion considers this evidence. [*San Diego Watercrafts, Inc. v. Wells Fargo Bank, N.A.* (2002) 102 Cal.App.4th 308, 315] More specifically:

- The correct citation as to the fact cited as Plaintiff's Undisputed Material Fact ("PUMF") #32 (Defense Objection 1) is at page 32:19-21
- The correct citation as to the fact cited as PUMF 35 (Defense Objection 2) is at page 37:22-23
- As to PUMF 38 (Defense Objection 3), the fact that the defendant's employees put the dog on the ground and told plaintiff to put the leash/collar on is found at page 40:17-19 (and plaintiff also testified to this at page 35:10-14)

However, the second portion of the fact cited at PUMF 38 (that the employees never offered to hold Cuddles for plaintiff or place Cuddles on a higher surface) does not appear to be supported by any of the deposition testimony presented by either party, so it is appropriately disregarded even though the objection is overruled.

As to the objection to plaintiff's declaration, this is overruled because it does not contradict anything plaintiff testified to (at least there is nothing contained in the portion provided by either party that contradicts the declaration). Defendant does not point to a specific portion of the testimony that contradicts the declaration. At best, it argues that plaintiff *did not testify to this at the deposition.* However, a party may supplement deposition testimony with a declaration, and this is not objectionable as

evidence. What plaintiff's attorney did or did not ask at the deposition (or what defense counsel failed to ask) is irrelevant to the analysis. The question is whether anything said at the deposition is contradicted by the declaration, and the court finds that it is not.

The only portion of the deposition testimony possibly relevant to the analysis (because it is dealing with plaintiff's *thoughts* at the time) is where plaintiff testified about what he did once they put the dog on the ground. He said: "Well, **not thinking**, I just bent over to put it on and I--." [See transcript at 35:15-16, emphasis added.] But this testimony is reasonably understood to mean that plaintiff bent over *instinctively*. On summary judgment the court must view the evidence in the light most favorable to plaintiff, as the nonmoving party, liberally construing his evidence while strictly scrutinizing defendant's evidence. [*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 856] This testimony does not appear to convey a meaning that plaintiff *thought nothing of (or didn't mind) the fact that the dog was on the ground without a leash or collar*.

Furthermore, if anything, plaintiff's declaration rather helps explain why he acted "without thinking" (or *instinctively*) at that time—he was afraid something bad would happen since the dog was not leashed, that the dog might run off or something. Certainly, whenever a person acts quickly, in an *instinctive* fashion, it is generally not because he is "without thought," but is actually because the person has an *additional thought process going on*—something motivating him/her to act, and to act quickly. Thus, the declaration supplements the deposition testimony, and is not contradictory.

Analysis of the motion:

Defendant has failed to meet its burden of production on this motion, so summary judgment is denied. The ultimate burden of persuasion on summary judgment rests on the moving party. In a defense motion, the initial burden of production is on defendant to show, by a preponderance of the evidence, that it is more likely than not that there is no triable issue of material fact. [*Aguilar v. Atlantic Richfield* (2001) 25 Cal.4th 826, 850] In determining whether any triable issues of material fact exist, the court must strictly construe the moving papers and liberally construe the declarations of the party opposing summary judgment. Any doubts as to whether a triable issue of material fact exist are to be resolved in favor of the party opposing summary judgment. [*Barber v. Marina Sailing, Inc.* (1995) 36 Cal.App.4th 558, 562]

Only if the moving party meets this initial burden does it shift to the opposing party, who is then subject to his own burden of production to make a *prima facie* showing that a triable issue of material fact exists. [*Aguilar v. Atlantic Richfield Co., supra,* at 850] A *prima facie* showing is one that is sufficient to support the position of the party in question. "No more is called for." [*Id.* at 851] If the moving party fails to meet this burden of production, the opposing party has no evidentiary burden to even oppose the motion.

The triable issue of material fact here is whether or not defendant breached its standard of care owed to Plaintiff as a commercial entity offering a service (dog grooming) to plaintiff and other members of the public. Moreover, taking a dog in for

grooming arguably creates a bailment, such that defendant as bailee must use such ordinary care as a prudent person would exercise with respect to its own property. [See Civil Code §1852; see *Gebert v. Yank* (1985) 172 Cal.App.3d 544—bailment created where plaintiff left thoroughbred horses in the care of defendants]

Plaintiff's evidence has provided at least one critical element to that analysis, not supplied by defendant, and that is the fact that in all times in the past his dog had always been returned to him with a collar and leash on. Plaintiff testified that he was a frequent and long-time user of defendant's dog grooming services, so his testimony as to defendant's normal custom is compelling.

Evidence of custom or practice of others similarly situated is always admissible on the issues of due care and negligence, unless it violates a standard prescribed by statute. [*Bullis v. Security Pac. Nat. Bank* (1978) 21 Cal.3d 801, 809] And while custom does not necessarily establish how a reasonable person must act, it is evidence to be considered in determining the proper standard of care. [*Polk v. City of Los Angeles* (1945) 26 Cal.2d 519, 531-532] Indeed, courts have ruled that a custom that is a settled practice "becomes a rule of conduct upon which the public has a right to rely to a reasonable extent, and a departure from such rule is a vitally important element in determining the question of negligence, for it constitutes a **departure from the standard of safety which the defendant has itself adopted**. [*Ross v. San Francisco-Oakland Terminal Rys. Co.* (1920) 47 Cal.App. 753, 766, emphasis added] In fact, the consideration of the influence of custom in the business context is particularly important in determining the standard of care in a bailment situation. [*Webber v. Bank of Tracy* (1924) 66 Cal.App. 29] Essentially, since the question is whether the defendant met its duty of *ordinary* care, consideration must be given to what is *ordinary for the business in question*. [*Id.* at 33]

Moreover, whether negligence can be predicated upon departure from custom is a question for the jury. [*Bullis v. Security Pac. Nat. Bank, supra*, 21 Cal.3d at 809*;* see also *Fowler v. Key System Transit Lines* (1951) 37 C.2d 65, 67—bus stopping in a different place from normal custom caused customer to step into gutter and fall]

A jury could certainly find that returning the dog with a leash (indeed having the dog leashed at all times unless impractical for the grooming process) was a minimum safety standard, not only for the dog and the dog's owner, but for all of defendant's customers. Thus, a jury could find that in not putting the collar and leash on plaintiff's dog before bringing it out, and then placing the dog on the ground without the collar and leash defendant failed to meet its standard of ordinary care. Plaintiff has provided evidence (which does not contradict his deposition testimony) that he bent over quickly to put on the collar because he was afraid that "something bad would happen, like the dog might run away." Even had defendant met its burden of production on this motion, this presents a triable issue of material fact that but for defendant's employees' conduct plaintiff would not have bent over and thus suffered his injuries.

If an actor's conduct is a substantial factor in bringing about the harm to plaintiff, he or she is liable despite unforeseeability of the extent of the harm *or the manner in which it occurred*. [Rest.2d, Torts §435] And when an actor's tortious conduct causes

harm to a person that, because of a preexisting physical or mental condition or other characteristics of the person, is of a greater magnitude or different type than might reasonably be expected, the actor is nevertheless subject to liability for all such harm to the person. [Rest.3d, Torts: Liability for Physical and Emotional Harm §31] Thus, even if plaintiff's injuries were not the type that might be expected to occur by defendant failing to keep the dog leashed (or at least secured or held until it was leashed), and even if plaintiff was more susceptible to the type of harm he incurred because of his advanced age, defendant could nonetheless be found liable for plaintiff's injuries, especially if the jury found that defendant's departure from its ordinary custom fell below its ordinary standard of care.

Pursuant to California Rules of Court, rule 3.1312 and Code of Civil Procedure section 1019.5(a), no further written order is necessary. The minute order adopting this ruling will serve as the order of the court, and service by the clerk of the minute order will constitute notice of the order.

Tentative Ruling
Issued By: JYH on 1/14/13.
(Judge's initials) (Date)

Tentative Ruling

(17)

Re: ***Maalikulmulk v. City of Fresno, et al.***
Superior Court Case No. 10CECG00755

Hearing Date: January 15, 2013 (Dept. 402)

Motion: Motion to Set Aside Dismissal

Tentative Ruling:

To deny without prejudice.

Explanation:

Under Code of Civil Procedure section 473, subdivision (b), the court is empowered to relieve a party "upon such terms as may be just ... from a judgment, dismissal, order or other proceeding taken against him or her through his or her mistake, inadvertence, surprise or excusable neglect."

Relief under section 473, subdivision (b) can be based either on: 1) an 'attorney affidavit of fault', in which event, relief is mandatory; or 2) declarations or other evidence showing 'mistake, inadvertence, surprise or excusable neglect,' in which event relief is discretionary. Code of Civil Procedure section 473, subdivision (b) also provides, in relevant part: "Application for this relief shall be … made within a reasonable time, *in no case exceeding six months*, after the judgment, dismissal, order, or proceeding was taken." (Code Civ. Proc. § 473, subd. (b) (emphasis added.)

The mandatory relief provision of section 473(b) is a "narrow exception to the discretionary relief provision for default judgments and dismissals." (*Zamora v. Clayborn Contracting Group, Inc*. (2002) 28 Cal.4th 249, 257.) Its purpose "'was to alleviate the hardship on parties who *lose their day in court* due solely to an inexcusable failure to act on the part of their attorneys.' " (*Ibid*., original italics.) An application for mandatory relief must be filed within six months of entry of judgment and be in proper form, accompanied by an attorney's sworn affidavit attesting to his or her mistake, inadvertence, surprise, or neglect. (*Huh v. Wang* (2007) 158 Cal.App.4th 1406, 1414.) The defaulting party "must submit sufficient evidence that the default was actually caused by the attorney's error. [Citation.] 'If the prerequisites for the application of the mandatory relief provision of section 473, subdivision (b) exist, the trial court does not have discretion to refuse relief.' " (*Huh*, *supra*, 158 Cal.App.4th at p. 1414.)

Here, the request is untimely. The dismissal occurred in June of 2011 and this motion was filed over fourteen months later. (*Rappleyea v. Campbell* (1994) 8 Cal.4th 975, 980.)

Nevertheless, "[a]fter six months from entry of default, a trial court may still vacate a default on equitable grounds even if statutory relief is unavailable."

(*Rappleyea v. Campbell*, supra, 8 Cal.4th 975, 981.) Extrinsic fraud or mistakes are commonly stated as being grounds for equitable relief. "However, those terms are given a broad meaning and tend to encompass almost any set of extrinsic circumstances which deprive a party of a fair adversary hearing." (*In re Marriage of Park* (1980) 27 Cal.3d 337, 342.) Extrinsic mistake is a term broadly applied when circumstances extrinsic to the litigation have unfairly cost a party a hearing on the merits. (*Rappleyea*, *supra*, 8 Cal.4th at p. 981.)

The Supreme Court held that in order to set aside a judgment based upon extrinsic mistake, a party must (1) " 'demonstrate that it has a meritorious case' "; (2) " 'articulate a satisfactory excuse for not presenting a defense to the original action' "; and (3) " 'demonstrate diligence in seeking to set aside the default once ... discovered.' " (*Rappleyea v. Campbell*, *supra*, 8 Cal.4th at p. 982.)

1.) Meritorious Case

Breach of Duty

Civil Code section 2100 provides: "A carrier of persons for reward must use the utmost care and diligence for their safe carriage, must provide everything necessary for that purpose, and must exercise to that end a reasonable degree of skill." This includes not running red lights and causing collisions. Defendants contend that the deposition testimony of Molyneux is insufficient to establish negligence because it simply says "we all had a green light" without providing the identification, location, distance, speed or direction or travel for the vehicles he is referring. However lines 16 and 17 of page 10 of Molyneux' deposition explain which vehicles had the green light. It is not necessary that Molyneux provide enough information to reconstruct the accident, only that he present a prima facie case of negligence – which he did by stating the bus driver ran the red light.

Defendants similarly dispute the importance of Medina's testimony claiming it does not establish negligence. It does. It too tends to prove that Heras ran the red light.

Defendants fault plaintiff for failing to include Heras' testimony that he had the green light, but this is not necessary. All plaintiff must prove is that she has a prima facie case, not make a showing that would prevail on summary judgment.

Causation

Defendant's argument that plaintiff has failed to introduce any argument as to causation and damages is better taken. All plaintiff says about causation and damages is: "Ms. Maalikulmulk alleges she suffered injuries [sic] as a result of the accident, including a full thickness tear of the rotator cuff which required surgical intervention." This statement is not evidence that the accident caused plaintiff any injuries. The court denies the motion for failure to show any evidence of causation and damages.

2) Satisfactory Excuse

Clerical error is a satisfactory excuse for the erroneous dismissal. In determining whether the attorney's mistake or inadvertence was excusable, "the court inquires whether 'a reasonably prudent *person* under the same or similar circumstances' might have made the same error.' " (*Bettencourt v. Los Rios Community College Dist*. (1986) 42 Cal.3d 270, 276, italics added.) In other words, the discretionary relief provision of section 473 only permits relief from attorney error "fairly imputable to the client, i.e., mistakes anyone could have made." (*Garcia v. Hejmadi* (1997) 58 Cal.App.4th 674, 682.)

Zamora v. Clayborn Contracting Group, Inc., supra, 28 Cal.4th 249 is directly on point. In *Zamora*, an attorney's legal assistant erroneous substituted the word "against" for the phrase "in favor of" in a Code of Civil Procedure section 998 offer. The appellate court would the error to be "a clerical or ministerial mistake that could have been made by anybody." (*Id*. at p. 259.) "While counsel's failure to review the document before sending it out was imprudent, we cannot say that his imprudence rendered the mistake inexcusable under the circumstances." (*Ibid*.) In reaching this conclusion, the appellate court cited and relied on *Romadka v. Hoge* (1991) 232 Cal.App.3d 1231, 1237 wherein the appellate court set aside a judgment where the attorney mistakenly checked the "with prejudice" box instead of the "without prejudice" box.

3) Reasonable Diligence

Plaintiff's attorneys do not state how they realized that the case had been dismissed on July 19, 2012. They do explain they never got notice that the bankruptcy stay of Robles had ended nearly as quickly as it was begun. It is conceivable that a case could be forgotten while presumed to be in bankruptcy. The motion for relief was filed quickly after the realization that the case had been dismissed.

Defendants claim this is a lack of diligence in prosecuting the case, but they never state what remains to be done in the case. It is clear that some depositions have been taken. However, the court is left to wonder: have all the depositions have been taken, all the written discovery has been exchanged and the parties are ready of trial?

Pursuant to California Rules of Court, rule 3.1312 and Code of Civil Procedure section 1019.5, subd. (a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling
Issued By: JYH on 1/14/13.
(Judge's initials) (Date)

Tentative Rulings for Department 403

(5)

Tentative Ruling

Re: ***Solomon Stanley v. State of California et al.***
Superior Court Case No. 11CECG03562

Hearing Date: January 15, 2013 **(Dept. 403)**

Motion: Compel Further Responses to Inspection Demands Set One

Tentative Ruling:

To treat the motion as a motion to compel compliance (CCP § 2031.320) and grant the motion. The Plaintiff is ordered to provide a privilege log for all documents he claims are privileged and produce all documents that are not protected by privilege to Inspection Demands Nos. 9-24 within 10 days of notice of the ruling. Sanctions in the amount of $510 will be imposed against the Plaintiff. Sanctions are due and payable within 30 days of notice of the ruling.

Explanation:

On or about September 19, 2012 Defendant propounded and served Inspection Demands aka Request for Production of Documents Set One. Responses were served on November 5, 2012. See Exhibit B attached to the Declaration of Hightower. After receiving the responses, Defendant's counsel sent a letter regarding the sufficiency of the responses. See Exhibit D. Plaintiff's counsel sent a letter regarding the discovery along with a statement that the documents would be mailed. See Exhibit E.

On November 19, 2012 Defendants filed and served a motion to compel further responses. The motion was timely served. See CCP § 2031.310(c). A Separate Statement was filed. See CRC Rule 3.1345. On January 2, 2013, Plaintiff filed a statement of non-opposition indicating that he intended to produce the documents.

In the case at bench, the Plaintiff responded with objections but also with an agreement to produce all the documents that are subject of the 16 Inspection Demands at issue except for Nos. 11 and 12. See Exhibit B attached to the Declaration of Hightower. However, it is unknown as to whether the documents have been produced. Further, the Plaintiff failed to serve a privilege log. Ultimately, it appears that a motion to compel compliance pursuant to CCP § 2031.320 should have been filed. In any event, such a motion has no fixed time limit or attempt to resolve informally. See CCP § 2031.320(a) and *Standon Co. Inc. v. Sup. Ct. (Kim)* (1990) 225 Cal.App.3d 898, 903. Therefore, the Court will treat the motion at bench as a motion to compel compliance. Plaintiff must provide a privilege log for all documents he claims are

privileged and produce all documents that are not protected by privilege as to Nos. 9-24 within 10 days of notice of the ruling.

The court "shall" impose a monetary sanction against whichever party loses on the motion to compel compliance ... *unless* it finds that party made or opposed the motion "with substantial justification" or other circumstances make sanctions "unjust." See CCP §§ 2031.320(b). In the instant case, Plaintiff promised to produce the documents in his letter of November 13, 2012. See Exhibit E. Apparently, at the time the statement of non-opposition had been filed on January 2, 2013, the documents still had not been produced. Therefore, the Court will impose sanctions against the Plaintiff in the amount of $521.00.

Pursuant to California Rules of Court, rule 3.1312(a) and Code of Civil Procedure section 1019.5, subd. (a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling
Issued By: KCK on 1/14/2013.
(Judge's initials) (Date)

Tentative Rulings for Department 501

(19) **Tentative Ruling**

Re: ***Salute of California v. Nelson***
Superior Court Case No. 10CECG03014

Hearing Date: January 15, 2013 (Department 501)

Motion: for order charging partnership interest of judgment debtor to pay judgment

Tentative Ruling:

To continue to February 19, 2013, ordering that moving party provide proof on or before January 22, 2013 that service on the partnership did occur on one authorized to accept service or, in the alternative, that service has been made on individual partners and the partnership at its business address.

To order that moving party file a motion to seal the Declaration of Kurt F. Vote filed October 5, 2012, which contains income tax information and social security numbers of third parties in its exhibits. A copy of the Vote declaration which omits the offending exhibit and replaces it with a sheet of paper bearing the legend "2010 Income Tax Return" shall be lodged with that motion. The motion to seal need be filed and served on the individual partners and Cullen Creek LLC as well as the parties to this case by January 22, 2013.

Moving parties are to submit a proposed order for the charge which provides the name and address information for the payee of any distribution due to judgment debtor, and which lists an expiration date of December 31, 2013. Should Corporations Code section 17302 be extended, a further order may be sought at that time.

Explanation:

1. Service Issues

The proof of service lists one person as the agent authorized to accept service for the partnership, but then states that service was actually made on another person in Gridley California, a distance of more than 200 miles from the partnership's office in Sanger, California. There is no foundation laid to support the conclusion that service on the person served was in fact authorized by Cullen Creek LLC to accept service on its behalf.

Absent proof of proper service on the entity to be bound by the order, no order will be issued.

2. Privacy and Privilege Issues

Attached as Exhibit B to the Vote declaration offered in support of the motion is part of the deposition of the judgment debtor, which states that the exhibit also included in that declaration is a draft tax return for Cullen Creek LLC. Counsel admits in the deposition that the document is subject to the protective order executed by the Court in this matter on January 6, 2012.

Tax returns and the information on them are privileged under California law. See *Webb v. Standard Oil Co.* (1957) 49 Cal.2d 509, and *Sav-On Drugs, Inc. v. Superior Court* (1975) 15 Cal. 3d 1. California Rules of Court, Rule 1.20(b)(2) forbids filing papers containing an individual's Social Security Number without redacting the number. The draft tax return contains unreacted Social Security Numbers of non-parties, none of whom appear to have been given notice that their personal financial information would be disclosed to the public.

Moving party is ordered to make a motion to seal the entire Vote declaration, as discussed above, filing and giving notice to all interested entities and persons on or before January 22, 2013. The hearing for that motion will be held at 3:30 p.m. on February 19, 2013 in this Department.

3. Order Sought

Once the service and privacy breach issues are resolved, there remains the question of the form of the order. Corporations Code section 17657 provides that the Code section permitting such an order expires at the end of 2013, unless it is renewed. A proposed order need be lodged which details the payment information and which provides for expiration of the order at the time the statutory authority for it expires.

Pursuant to Code of Civil Procedure section 1019.5, subdivision (a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling
Issued By: M.B. Smith on 1/14/2013.
(Judge's initials) (Date)

(19) **Tentative Ruling**

Re: ***Salazar v. California Reconveyance Co.***
Superior Court Case No. 11CECG00840

Hearing Date: January 15, 2013 (Department 501)

Motion: by defendants Alavarez, Anguiano, and Legal Foreclosure Services to set aside defaults

Tentative Ruling:

To deny.

Explanation:

Defendant Alvaraez' default was taken on April 19, 2012. The motion to set aside that default was filed on October 19, 2012, one day over the six month period permitted for such a motion. . Code of Civil Procedure section 473(b) states, in part: "Application for this relief . . . shall be made within a reasonable time, in no case exceeding six months, after the judgment, dismissal, order, or proceeding was taken."

Even if Alvarez' motion were deemed timely in terms of the six month period, it has not been brought in a "reasonable" time. Nor has that of her co-defendants/moving parties. Her current counsel has known of the defaults since shortly after they were taken, by his own admission, as did defendant Anguiano. Her counsel substituted in on May 22, 2012, yet this motion was not filed until October 19, 2012. Evidence adduced by plaintiff shows that current counsel for moving defendants has been counsel for the company and its employees in other cases since at least February of 2011. The company's website advises in Spanish that he is the company's real estate attorney and available to assist customers. No excuse for the delay is given, and trial is February 19, 2013.

"In order to qualify for [discretionary] relief under section 473, the moving party must act diligently in seeking relief and must submit affidavits or testimony demonstrating a reasonable cause for the default." *Huh v. Wang* (2007) 158 Cal. App. 4th 1406, 1419. In that case, the judgment complained of was entered in March and the motion to set it aside was made in July of the same year, a time span of about 3.5 months Here, the default was taken in April (and others in May), and the motion to set aside was not made until October – a greater delay of four months.

Current counsel does not admit to any wrongdoing with regard to the defaults. He ascribes the fault to prior counsel, who has also been his co-counsel for some cases in which the same business was a defendant. That attorney, Mr. Boyd, provides no declaration. Plaintiff's counsel testifies that Mr. Boyd told he his clients refused to cooperate or communicate with him, that would seek to withdraw. Mr. Neilson came into the matter not long after that.

> "[T]he court shall, whenever an application for relief is made no more than six months after entry of judgment, is in proper form, and is

accompanied by an attorney's sworn affidavit ***attesting to his or her*** mistake, inadvertence, surprise, or neglect, vacate any (1) resulting default entered by the clerk against his or her client . . ."

Code of Civil Procedure section 473(b), emphasis added.

"[T]he defaulting party must submit sufficient admissible evidence that the default was actually caused by the attorney's error." *Huh v. Wang*, *supra*, 158 Cal. at 1414. That is not provided here.

Moving parties are not without a remedy. They do have the option of seeking a malpractice judgment against counsel if they believe there was negligence. But they have not meet the legal requirements for discretionary or for mandatory relief under Code of Civil Procedure section 473(b).

Pursuant to Code of Civil Procedure section 1019.5, subdivision (a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling
Issued By: M.B. Smith on 1/14/2013.
(Judge's initials) (Date)

(6)

Tentative Ruling

Re: ***Coelho v. Coelho***
Superior Court Case No.: 12CECG01680

Hearing Date: January 15, 2013 (**Dept. 501**)

Motion: Petitions to confirm final partial arbitration awards #3 and #4 by Petitioner Edward Coelho

Tentative Ruling:

To grant. The court will executed the submitted order confirming partial final arbitration awards and the submitted interlocutory judgment re: partial final arbitration awards. The court has not considered the "supplemental" reply and "supplemental declaration of Joseph Marchini" filed without court permission on January 9, 2013; nor has it considered the "surreply" filed without court permission by Vincent Coelho on January 11, 2013.

Explanation:

Justice Agliano's jurisdiction over the 2005 stipulation for settlement agreement was "complete" under its terms and included granting to him the ability to decide all matters concerning disputes arising from the 2005 stipulation for settlement agreement. (Petition, attachment 4c, ¶¶24, 26.)

A court has extremely limited power to review judicial arbitration awards. (*Moncharsh v. Heily & Blase* (1992) 3 Cal.4th 1, 11.)

It appears that any matter concerning the FJEV property belonging to Edward Coelho passing to Vincent Coelho pursuant to their separate agreement was a matter for the arbitration concerning that agreement, not the current arbitration concerning the 2005 stipulation for settlement agreement. That whether or not the 65 acres of the Floribel property passes with an easement that runs with the land or not may be an overlapping issue with the arbitration of the agreement between Edward Coelho and Vincent Coelho, does not mean that Justice Agliano's fourth partial final award in this case fails to comply with the stipulation for settlement which defines the scope of Justice Agliano's authority. (*Moncharsh v. Heily & Blase* (1992) 3 Cal.4th 1, 11.) Multiple partial final award are an appropriate remedy. (*Advanced Micro Devices, Inc. v. Intel Corporation* (1994) 9 Cal.4th 362, 372-373.) Vincent Coelho has failed to show where Justice Agliano exceeded his authority by requiring to have his wife, Andrea Coelho, execute "certain documents" to close the escrows. (Decl. of Joseph Marchini, ¶14, exhibit L.) Nor did Justice Agliano attempt to enforce his order in a way that exceeded his statutory authority as was the case in *Luster v. Collins* (1993) 15 Cal.App.4th 1338, 1348.

Any award of attorney's fees under the stipulation for settlement agreement must be determined by Justice Agliano under ¶27 of the stipulation for settlement agreement and not by this court.

Pursuant to California Rules of Court, rule 3.1312(a), and Code of Civil Procedure section 1019.5, subdivision (a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling
Issued By: M.B. Smith on 1/14/2013.
(Judge's initials) (Date)

Tentative Ruling

(17)

Re: ***Lucas v. KTDA Group Homes, Inc. et al.***
Superior Court Case No. 11CECG02159

Hearing Date: January 15, 2012 (Dept. 501)

Motion: Defendant's Motion to Compel; For Contempt; and For Sanctions

Tentative Ruling:

To deny the motion to compel as moot. To deny motion for contempt. To deny sanctions.

Explanation:

Counsel has represented that the parties have come to an agreement with respect to the deposition of Ms. Landry and her deposition has been scheduled for January 21, 2013. Accordingly the motion to compel is moot.

Defendant has asked its sanction request remain on calendar. A deponent who fails to appear for the taking of oral testimony when the deposition subpoena calls for same, (See Code Civ. Proc. § 2020.220, subd. (c)) may be punished for contempt (See Code Civ. Proc. § 2020.240) and is subject to damages as set forth in Code of Civil Procedure section 1992. Section 1992 provides that a person who fails to appear pursuant to a subpoena forfeits the sum of $500 to the party aggrieved and all damages that the aggrieved party may have sustained by the witnesses failure to appear.

Sanctions are not appropriate here. The notice of motion is defective. Code of Civil Procedure section 2023.040 provides, in relevant part: "A request for a sanction shall, in the notice of motion, identify every person, party, and attorney against whom the sanction is sought, and specify the type of sanction sought." The instant notice of motion does not identify the person or persons against whom the monetary sanctions are sought.

Discovery sanctions may only be imposed after the party to be sanctioned has been given notice and an opportunity to be heard. (Code Civ. Proc. § 2023.040; *Sole Energy Co. v. Hodges* (2005) 128 Cal.App.4th 199, 208 (*Sole Energy*).) "Adequate notice prior to imposition of sanctions is mandated not only by statute, but also by the due process clauses of both the state and federal Constitutions." (*O'Brien v. Cseh* (1983) 148 Cal.App.3d 957, 961.) "A basic rule of law and motion practice is the notice of motion 'shall state in the opening paragraph the nature of the order being sought and the grounds for issuance of the order.' " (*Sole Energy*, *supra*, 128 Cal.App.4th at p. 207; Cal. Rules of Court, rule 3.1110(a).)

Contempt

Defendant did not make a proper motion for contempt.

First, Defendant did not mention contempt in the body of its notice of motion.

Second, when contempt is not committed in the immediate view and presence of the court, the facts constituting the contempt shall be presented to the court in an affidavit. (Code Civ. Proc. § 1211, subd., (a).) After notice to the opposing party's lawyer, the court (if satisfied with the sufficiency of the affidavit) must sign an order to show cause re contempt in which the date and time for a hearing are set forth. (Code Civ. Proc. § 1212; *Arthur v. Superior Court* (1965) 62 Cal.2d 404, 408 ["an order to show cause must be issued"].)

The problem with this "motion" is that that it does not seek an Order to Show Cause re: Contempt; it asks for relief in the first instance. Again, Code of Civil Procedure section 1010 requires that a notice of motion state the grounds on which the motion is made; "this section has been construed to mean that the trial court may consider only such grounds as are specified in the motion." (*Castagnoli v. Castagnoli* (1954) 124 Cal.App.2d 39, 41.) No Order to Show Cause was submitted with the moving papers for the Court's review and signature. The motion is denied.

Pursuant to California Rules of Court, rule 3.1312, subd. (a) and Code of Civil Procedure section 1019.5, subd. (a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling
Issued By: M.B. Smith on 1/14/2013.
(Judge's initials) (Date)

Tentative Rulings for Department 502

(18)

Tentative Ruling

Re: ***Judy Aylward v. Winco Foods, Inc.***
Case no. 12CECG01388

Hearing Date: **January 15, 2013 (Dept. 502)**

Motion: By defendant, to compel responses to certain form and special interrogatories, request for production of documents, and for an order deeming admissions, and for monetary sanctions

Tentative Ruling:

To grant the motion to compel responses to the subject interrogatories and requests for production. Plaintiff is ordered to provide complete verified responses, without objection, to the subject interrogatories and requests for production, within 10 days after service of this order. To grant the motion for an order establishing admissions. Sanctions in the amount of $480.00 are awarded in favor of defendant, and against plaintiff, and are to be paid within 30 days of this order.

Explanation:

Counsel for defendant represents in his supporting declaration that although he requested responses to the subject discovery, and responses were due by October 2, 2012, no responses have been provided. Under California Code of Civil Procedure (CCP) sections 2030.290(b) and 2031.300(b), when a party has failed to submit timely responses to written interrogatories and requests for production, respectively, the court may enter an order compelling such responses. An order compelling defendant to provide responses without objections is warranted. (*Sinaiko Healthcare Consulting, Inc. v. Pacific Healthcare Consultants* (2007) 148 Cal.App.4th 390, 404.) As to the requests for admissions, pursuant to CCP section 2033.280(c), it is the order of the court, unless defendants provide, before the hearing on this motion, a proposed response that is in substantial compliance with CCP section 2033.220, that the genuineness of any documents is established, and the truth of any matters is deemed admitted. Monetary sanctions are awarded as stated above.

Pursuant to California Rules of Court rule 3.1312, and CCP section 1019.5, subdivision (a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling
Issued By: DSB on 1/14/13.
(Judge's initials) (Date)

03

Tentative Ruling

Re: ***West Star Environmental, Inc. v. Department of California Highway Patrol***
Case No. 12CECG01968

Hearing Date: January 15th, 2013 (Dept. 502)

Motion: Defendants California Highway Patrol and Victim Compensation and Government Claims Board's Demurrer to Complaint

Tentative Ruling:

To overrule the demurrer as to defendant California Highway Patrol. (CCP § 430.10.) To sustain the demurrer as to the entire complaint with regard to defendant Victim Compensation and Government Claims Board for failure to state facts sufficient to constitute a cause of action, without leave to amend. (CCP § 430.10(e).)

Explanation:

With regard to defendants' first contention, that plaintiff has not alleged any facts regarding its compliance with the claims filing statute, plaintiff has alleged that it complied with the statute, and it has also attached a copy of the rejection letter from the Victim Compensation and Government Claims Board. (Complaint, p. 2, ¶ 5a, and Exhibit 4 to Complaint.) It is unclear what other facts defendants believe plaintiff needs to allege in order to show compliance with the claims filing statute. Therefore, the court will not sustain the demurrer to the entire complaint on this ground.

Also, defendant CHP's demurrer to the open book account cause of action is not well taken. CHP argues that plaintiff's open book account claim is insufficiently pled, since plaintiff has not alleged a statutory basis for its claim. (Govt. Code § 815; *Zuniga v. Housing Authority* (1995) 41 Cal.App.4th 82.) However, while it is true that Govt. Code § 815 generally abolished all common law **tort** claims against public entities, section 815 does not apply to contractually based claims.

In the Legislative Comments to Govt. Code § 815, the legislature declared that, "[b]ecause of the limitations contained in Section 814, which declares that this part does not affect liability arising out of contract or the right to obtain specific relief against public entities and employees, the practical effect of this section is to eliminate any common law governmental liability for damages arising out of torts." (Govt. Code § 815, Legislative Committee Comments - Senate.)

Section 814 declares that "[n]othing in this part affects liability based on contract or the right to obtain relief other than money or damages against a public entity or public employee." (Govt. Code § 814.)

"The doctrine of sovereign immunity has not protected public entities in California from liability arising out of contract. This section makes clear that this statute has no effect on the contractual liabilities of public entities or public employees." (Govt. Code § 814, Legislative Committee Comments – Senate.)

Therefore, plaintiff is not required to plead an express statutory basis for its open book account claim, which is based on the contract between itself and the CHP. As a result, the court intends to overrule the CHP's demurrer to the complaint.

However, the court intends to sustain the demurrer to the entire complaint with regard to defendant Victim Compensation and Government Claims Board. Plaintiff has not alleged that there is a contract between itself and the VCGCB, or that the VCGCB did anything to injure plaintiff or violated any other statutory duty to plaintiff. Indeed, plaintiff alleges no facts at all with regard to the VCGCB. The only reference to the VCGCB is the attached copy of the letter from the Board, rejecting plaintiff's claim. (Exhibit 4 to Complaint.) However, this letter does not appear to create any basis for liability, especially in the absence of any other facts alleged against the Board. Therefore, the court intends to sustain the demurrer as to the VCGCB. Furthermore, since plaintiff has not opposed the demurrer or explained how it could state a valid claim against the VCGCB, the court intends to sustain the demurrer without leave to amend.

Pursuant to CRC 3.1312 and CCP §1019.5(a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling
Issued By: DSB on 1/14/13.
(Judge's initials) (Date)

(5)

Tentative Ruling

Re: ***Madrid et al. v. River Ridge Partners, LLC et al. and related Cross Actions***
Superior Court Case No. 12CECG00185

Hearing Date: January 15, 2013 **(Dept. 502)**

Motion: Motion by Cross-Defendant and Cross-Complainant Terry Tuell Concrete Inc. to set aside the Order on Stipulation to Appoint Special Master

Tentative Ruling:

To grant, without prejudice to a further stipulation pursuant to Code of Civil Procedure section 638 or further proceedings related to the appointment of a referee pursuant to Code of Civil Procedure section 639 or otherwise.

Explanation:

The Order was expressly based on Code of Civil Procedure sections 638 and 187and on the stipulation of the parties. The court can find no support for the broad scope of the order in section 187. Further, in the absence of a stipulation, section 638 authorizes appointment of a referee only when there is a prior agreement between the parties to that effect.

Here no prior agreement is shown and the stipulation was entered into before all parties were served or appeared in the action. As it turns out, parties have been added since the stipulation was signed. Thus, as to the current parties to the case, no stipulation between all the parties exists. Given the broad powers conferred on a referee appointed pursuant to section 638 and the apparent adverse legal relationship between both plaintiffs and defendants (who executed the stipulation), on the one hand, and cross-defendants or future cross-defendants (who did not execute the stipulation), on the other, the order must be vacated.

Pursuant to California Rules of Court, Rule 3.1312(a) and Code of Civil Procedure § 1019.5, subd. (a), no further written order is necessary. The minute order will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling
Issued By: DSB on 1/14/13.
(Judge's initials) (Date)

Tentative Rulings for Department 503

03

Tentative Ruling

Re: ***Anlin Industries v. R Squared Contracting, Inc.***
Case No. 11CECG03063

Hearing Date: January 15th, 2013 (Dept. 503)

Motion: Plaintiff's Motion for Summary Judgment

Tentative Ruling:

To grant the plaintiff's motion for summary judgment as to defendants R Squared Contracting, Inc., dba R-Squared Contracting Inc., dba Green House Builders, Robert Russell Earnshaw, aka Russ Earnshaw, and Green House Holdings, Inc. (CCP § 437c.)

Explanation:

Plaintiff has submitted evidence establishing all of the required elements of its breach of contract and common count claims. The essential elements of a breach of contract claim are (1) the existence of a contract between the parties, (2) performance by plaintiff, (3) breach by defendant, and (4) resulting damage to plaintiff. (*Smith v. Royal Manufacturing Co*. (1960) 185 Cal.App.2d 315, 325.)

Here, plaintiff's evidence shows that there was a contract between plaintiff and defendants, in which plaintiff agreed to provide goods and services in return for payment. (Wilson decl., ¶ 2.) Defendant Earnshaw also executed a personal guarantee of the indebtedness. (*Ibid*.) Earnshaw admitted at his deposition that he signed the guarantee. (Exhibit D to decl. of Abbott, p. 28:14-25.) Plaintiff's evidence also shows that plaintiff performed under the agreement by providing the agreed upon goods and services, but that defendants failed to pay for the goods and services despite demands from plaintiff. (Wilson decl., ¶¶ 5, 6.) Plaintiff has suffered damages of $121,950.44 as a result of the defendants' breach. (*Id*. at ¶ 7.) Therefore, plaintiff has established its prima facie claim for breach of contract.

Plaintiff has also established its common count claims for open book account, account stated, and reasonable value of goods and services. The evidence shows that plaintiff kept an account of the amounts owed to defendants, and defendants have failed to pay on the amounts due. (Wilson decl., ¶¶ 4-6, and Exhibit B to Wilson decl.) In addition, plaintiff's evidence shows that the reasonable value of the goods and services provided is $121,950.44. (*Id*. at ¶ 7.) Therefore, plaintiff has shown that it is entitled to summary judgment on all of its claims.

Defendant has not filed opposition or submitted any facts or evidence that would tend to raise a triable issue of material fact. Therefore, defendant has not met its burden of raising any triable issues with regard to plaintiff's claims. (CCP § 437c(b)(3), (c).) As a result, the court intends to grant summary judgment in favor of plaintiff and against defendants R Squared, Earnshaw, and Green House Holdings in the amount of $121,950.44, plus interest of $11,757.00.

Pursuant to CRC 3.1312 and CCP §1019.5(a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling
Issued By: MWS on 1/11/2013.
(Judge's initials) (Date)

(20) **Tentative Ruling**

Re: ***Burson v. Stonehouse et al.***, Superior Court Case No. 12CECG00624

Hearing Date: **January 15, 2013 (Dept. 503)**

Motion: Defendants' for Protective Order

Tentative Ruling:

To deny and impose $2,475 in monetary sanctions in favor of plaintiff and against defendants, payable within 30 days. Code Civ. Proc. §§ 1987.1, 1987.2, 2017.020.

Explanation:

In this elder abuse action plaintiff alleges that her sisters, defendants, exercised undue influence over their parents, resulting in a taking of the property. Plaintiff subpoenaed financial records relating to the trust in order to find evidence of this claim.

Defendants first argue that the subpoena directed at Bank of America is procedurally defective because the date specified for production of the records was earlier than the date the subpoena was issued. Clearly, the subpoena did not comply with Code Civ. Proc. § 1985.3(b)(2), which requires that the notice to consumer shall be served not less than 10 days prior to the date of production specified in the subpoena. But a revised subpoena in compliance with this section has been served, and the court will treat this as the operative subpoena.

Defendants also argue that the subpoenas are beyond the scope of discovery because they seek documents going back to the year 2000. The complaint in this action was filed on 2/24/12. Welf. & Inst. Code § 15657.7 imposes a four-year statute of limitations. Defendants contend that any documents generated more than 4 years prior to that date, or 2/24/08, are not relevant to the subject matter. However, section 15657.7 incorporates the discovery rule, providing that the action must be "commenced within four years after the plaintiff **discovers or, through the exercise of reasonable diligence, should have discovered**, the facts constituting the financial abuse." (Emphasis added.) A fair reading of the Complaint is that the acts that plaintiff contends constitute elder abuse began at least in early to mid-2001 (Complaint ¶¶ 9-12), and that plaintiff was unaware that her parents executed any amendments to the trust, which effectively divested her of her inheritance, until after her father died in 2011 (Complaint ¶ 14). Plaintiff should be permitted to pursue discovery of evidence that would support any actionable claims. The subpoenas are not overbroad as to time.

Defendants next argue that the documents are protected by Stonehouse and Robert Smittcamp's Constitutional right of privacy as successor trustees of the trust. Certainly, personal financial information is constitutionally protected (*Maskowitz v. Superior Court* (1982) 137 Cal.App.3d 313, 315), and can only be ordered produced if the requesting

party shows that the information sought is "directly relevant" to the claim or defense (*Britt v. Superior Court* (1978) 20 Cal.3d 844, 859-62). But none of the subpoenas seek information pertaining to Smittcamp. Nor do the subpoenas seek information about the personal finances of either defendant. Defendants only contend that the privacy interest is implicated because Stonehouse and Smittcamp are current trustees.

As plaintiff points out in the opposition, trustees owe a fiduciary duty to the beneficiaries, which includes a duty of full disclosure regarding handling of the corpus of the trust. *Strauss v. Superior Court* (1950) 36 Cal.2d 396, 401-402. In light of this duty of disclosure, a trustee doesn't appear to have any right of privacy in financial transactions relating to the trust. Accordingly, no right of privacy is implicated.

If a right of privacy were implicated here, disclosure may be ordered if there is a compelling state interest which will be served thereby. *Britt v. Superior Court* (1978) 20 Cal.3d 844, 852. The burden is on the party seeking the records to show that the information sought is directly relevant to a cause of action or defense. *Id.* at 859-862. Plaintiff has shown that the subpoenas seek records directly relevant to the issues raised by the complaint. Plaintiff claims that defendants exercised undue influence over their parents, resulting in a taking of their property so as to constitute elder financial abuse. Records pertaining to the administration of the trust and the parents' finances are relevant to that claim.

Pursuant to Cal. Rules of Court, Rule 3.1312(a) and Code Civ. Proc. § 1019.5(a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling
Issued By: MWS on 1/11/2013.
(Judge's initials) (Date)